

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Michael's Landing LLC
6600 Westown Parkway
West Des Moines, Iowa 50266

Respondent

Proceedings under Section 309(g) of the
Clean Water Act, 33 U.S.C. § 1319(g)

Docket No. CWA-07-2008-0033

FINDINGS OF VIOLATION, ORDER FOR COMPLIANCE

Preliminary Statement

1. The following Findings of Violation and Order for Compliance ("Order") are made and issued pursuant to the authority of Section 309(a)(3) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(a)(3). This authority has been delegated by the Administrator of the United States Environmental Protection Agency ("EPA") to the Regional Administrator, EPA Region VII and further delegated to the Director of Region VII's Water, Wetlands and Pesticides Division.

2. Respondent is Michael's Landing, L.L.C., a company incorporated under the laws of and authorized to conduct business in the State of Iowa.

Statutory and Regulatory Framework

3. Section 301(a) of the CWA, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants except in compliance with, *inter alia*, Section 402 of the CWA, 33 U.S.C. § 1342. Section 402 of the CWA, 33 U.S.C. § 1342, provides that pollutants may be discharged only in accordance with the terms of a National Pollutant Discharge Elimination System (NPDES) permit issued pursuant to that Section.

4. The CWA prohibits the discharge of “pollutants” from a “point source” into a “navigable water” of the United States, as these terms are defined by Section 502 of the CWA, 33 U.S.C. § 1362.

5. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), sets forth requirements for the

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issuance of NPDES permits for the discharge of storm water. Section 402(p) of the CWA, 33 U.S.C. § 1342(p), requires, in part, that a discharge of storm water associated with an industrial activity must conform with the requirements of an NPDES permit issued pursuant to Sections 301 and 402 of the CWA, 33 U.S.C. §§ 1311 and 1342.

6. Pursuant to Section 402(p) of the CWA, 33 U.S.C. § 1342(p), EPA promulgated regulations setting forth the NPDES permit requirements for storm water discharges at 40 C.F.R. § 122.26.

7. 40 C.F.R. § 122.26(a)(1)(ii) and 122.26(c) require dischargers of storm water associated with industrial activity to apply for an individual permit or to seek coverage under a promulgated storm water general permit.

8. 40 C.F.R. § 122.26(b)(14)(x) defines "storm water discharge associated with industrial activity," in part, as construction activity including clearing, grading, and excavation, except operations that result in the disturbance of less than five (5) acres of total land area which are not part of a larger common plan of development or sale.

9. The Iowa Department of Natural Resources (IDNR) is the state agency with authority to administer the federal NPDES program in Iowa pursuant to Section 402 of the CWA, 33 U.S.C. § 1342. EPA maintains concurrent enforcement authority with authorized states for violations of the CWA.

10. The IDNR implemented a General Permit for the discharge of storm water under the NPDES, Permit No. 2. The permit governs storm water discharges associated with industrial activity from construction sites (i.e., those sites or common plans of development or sale that will result in the disturbance of one or more acres of total land area), including storm water discharges associated with industrial activity from areas that are dedicated to producing earthen materials, such as soils, sand and gravel, for use at a single construction site.

Factual Background

11. Respondent is a "person" as defined by Section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. At all times relevant to this action, Respondent was the owner and/or operator of a construction site known as Michael's Landing, located at the southwest corner of Mills Civic Parkway and 88th Street in West Des Moines, Iowa (the Site).

13. Storm water, snow melt, surface drainage and runoff water leaves Respondent's facility and goes into a tributary of Sugar Creek, which in turn is a tributary of the Raccoon River. The runoff and drainage from Respondent's facility is "storm water" as defined by 40

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C.F.R. § 122.26(b)(13).

14. Storm water contains "pollutants" as defined by Section 502(6) of the CWA, 33 U.S.C. § 1362(6).

15. The Site has "storm water discharges associated with industrial activity" as defined by 40 C.F.R. § 122.26(b)(14)(x) and is a "point source" as defined by Section 502(14) of the CWA, 33 U.S.C. § 1362(14).

16. Respondent discharged pollutants into a tributary of Sugar Creek. This tributary of Sugar Creek is a "navigable water" as defined by CWA Section 502, 33 U.S.C § 1362.

17. Storm water runoff from Respondent's construction site results in the addition of pollutants from a point source to navigable waters, and thus is the "discharge of a pollutant" as defined by CWA Section 502(12), 33 U.S.C. § 1362(12).

18. Respondent's discharge of pollutants associated with an industrial activity, as defined by 40 C.F.R. § 122.26(b)(14)(x), requires a permit issued pursuant to Section 402 of the CWA, 33 U.S.C. § 1342.

19. On or about October 18, 2005, Respondent submitted a Notice of Intent to IDNR for NPDES coverage under General Permit No. 2. IDNR assigned Respondent Permit No. IA - 10498 - 10287, which was issued on November 2, 2005 and will expire on September 30, 2008 (Permit).

20. On May 25, 2007, EPA performed an inspection of the Site under the authority of Section 308(a) of the CWA, 33 U.S.C. § 1318(a). The purpose of the inspection was to evaluate Respondent's compliance with the permit described in paragraph 19 and Respondent's compliance with the CWA.

Findings of Violation

Count 1 - Failure to Install Appropriate Best Management Practices

21. The facts stated in paragraphs 11 through 20 above are herein incorporated.

22. Part IV of the Permit requires Respondent develop a Storm Water Pollution Prevention Plan (SWPPP) to describe and ensure the implementation of practices which will be used to reduce the pollutants in storm water discharge associated with industrial activity for construction activities at the construction site and to assure compliance with the terms and conditions of this permit. Furthermore, the Permit requires Respondent to implement the provisions of the SWPPP.

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23. Part IV, Section D.2.A.(1) of the Permit requires that site plans should ensure that existing vegetation is preserved where attainable and that disturbed areas are stabilized. Stabilization practices may include temporary seeding, permanent seeding, mulching, geotextiles, sod stabilization, vegetative buffer strips, protection of trees, preservation of mature vegetation, and other appropriate measures. Except as precluded by snow cover, stabilization measures shall be initiated on all disturbed areas as soon as practical but in no case where construction activity will not occur for a period of 21 or more calendar days later than the 14th day after no construction activity has occurred on such area.

24. The inspection referenced in paragraph 20 above revealed that a large earthen ditch extending for several hundred yards in the northeast part of the site near the planned 91st and Creekview Drive intersection had not been stabilized for at least eight months. This resulted in storm water runoff into the tributary.

25. The inspection referenced in paragraph 20 above revealed that a long steep slope west of the tributary on the north side of Stagecoach Road, near culvert #4, was devoid of vegetation and was not stabilized.

26. Respondent's failure to properly install appropriate impediments to sediment movement is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 2 - Failure to Maintain Best Management Practices

27. The facts stated in paragraphs 11 through 20 above are herein incorporated.

28. Part IV, Section D.3 of the Permit requires that the SWPPP include a description of procedures to maintain in good and effective operating conditions vegetation, erosion and sediment control measures and other protective measures. These measures can include, among other items, silt fences, earth dikes, drainage swales, sediment traps, check dams, subsurface drains, storm drain inlet protection, and temporary or permanent sediment basins.

29. The inspection referenced in paragraph 20 above revealed that west of Culvert #1, the banks of the tributary leading up to Sugar Creek were eroding significantly, thereby posing a significant threat to the structural integrity of Temporary Sediment Trap #11.

30. The inspection referenced in paragraph 20 above revealed that the banks of the tributary both immediately upstream and downstream of Culvert #1 were eroding, thereby allowing sediment deposition into the tributary.

31. During the inspection referenced in paragraph 20 above, many of Respondent's silt

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fences on the slopes west of the tributary on the north side of Stagecoach Road, near culvert #4, were over-topped and/or undermined.

32. The inspection referenced in paragraph 20 above also revealed an overtopped silt fence at the southwest corner of the site north of Boonville Road. According to Respondent's own inspection records, this silt fence had been listed as failing during nearly each inspection from January to May 2007.

33. Records reviewed by EPA's inspector during the inspection showed that at least 34 separate silt fences had failed during 10 out of 17 weekly inspections conducted by Respondent from January to May 2007.

34. Respondent's SWPPP indicates that sediment basins will be inspected for depth of the sediment, and any built-up sediment will be removed when it reaches 25 percent of the design capacity.

35. The inspection referenced in paragraph 20 above revealed the standpipes of Temporary Sediment Basins #6 and 14 were nearly level with the surface of the water, indicating that the slots were clogged with silt and were in need of repair.

36. Part IV, Section D.2.B.(2) of the Permit requires that velocity dissipation devices shall be placed at discharge locations and along the length of any outfall channel as necessary to provide a non-erosive velocity flow from the structure to a water course so that the natural physical and biological characteristics and functions are maintained and protected.

37. The inspection referenced in paragraph 20 above revealed that the rip-rap apron used by Respondent to stabilize the bank just below a storm sewer outfall west of culvert #1 was ineffective in preventing the bank from collapsing and sloughing off into the stream bed.

38. Respondent's failure to properly maintain its pollution control measures is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 3 - Failure to Perform and Document Site Inspections

39. The facts stated in paragraphs 11 through 20 above are herein incorporated.

40. Part IV, Section D.4 of the Permit requires Respondent to provide qualified personnel to inspect disturbed areas of the construction site that have not been finally stabilized at least once every seven calendar days and within 24 hours of the end of a storm that is 0.5 inches or greater. In addition, Respondent is required to write a report summarizing the scope of the inspection, name(s) and qualifications of personnel making the inspection, the date(s) of the

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inspection, major observations relating to the implementation of the SWPPP, and any actions taken based on the results of the inspection. This report shall be retained as part of the SWPPP for at least three years after final stabilization has been achieved and a Notice of Discontinuation has been submitted.

41. During the inspection referenced in paragraph 20 above, it was determined that Respondent did not conduct an inspection and/or write an inspection report between April 6 and April 20, 2007.

42. During the inspection referenced in paragraph 20 above, it was determined that six rain events of 0.5 inches or greater occurred between January and May 2007. According to Respondent's inspection log, Respondent did not conduct site inspections within 24 hours of four of those rain events.

43. Respondent's failure to conduct and document site inspections in a timely manner is a violation of Respondent's General Permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Count 4 - Failure to Have a Complete Storm Water Pollution Prevention Plan

44. The facts stated in paragraphs 11 through 20 above are herein incorporated.

45. Part IV, Section D.7 of the Permit requires that Respondent's SWPPP identify for each measure in the SWPPP, the contractor(s) and/or subcontractor(s) that will implement the measure. Furthermore, all contractors and subcontractors identified in the SWPPP must sign a copy of the certification statement contained in Part IV, Section D.7.B.

46. Of the 22 individuals listed in the SWPPP on the date of the inspection referenced in paragraph 20 above, only two signed certification statements.

47. Respondent's failure to develop a complete SWPPP is a violation of Respondent's permit, and as such, is a violation of Sections 301(a) and 402(p) of the CWA, 33 U.S.C. § 1311(a) and § 1342(p).

Order For Compliance

48. Based on the Factual Background and Findings of Violation set forth above, and pursuant to the authority of Sections 308(a) and 309(a)(3) of the CWA, 33 U.S.C. §§ 1318(a) and 1319(a)(3), Respondent is hereby ORDERED to take the actions described in paragraphs 49 through 51.

49. Within thirty (30) days of the effective date of this Order, Respondent shall take

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whatever corrective action is necessary to correct the deficiencies and eliminate and prevent recurrence of the violations cited above, and to come into compliance with all of the applicable requirements of the permit.

50. Within thirty (30) days of the effective date of this Order, the Respondent shall submit a written report detailing the specific actions taken to correct the violations cited herein and explaining why such actions are anticipated to be sufficient to prevent recurrence of these or similar violations.

51. In the event that Respondent believes complete correction of the violations cited herein is not possible within thirty (30) days of the effective date of this Order, the Respondent shall, within those thirty (30) days, submit a comprehensive written plan for the elimination of the cited violations. Such plan shall describe in detail the specific corrective actions to be taken and why such actions are sufficient to correct the violations. The plan shall include a detailed schedule for the elimination of the violations within the shortest possible time, as well as measures to prevent these or similar violations from recurring.

Submissions

52. All documents required to be submitted to EPA by this Order, shall be submitted by mail to:

Michael Boeglin
Water, Wetlands, and Pesticides Division
U.S. Environmental Protection Agency - Region 7
901 North Fifth Street
Kansas City, KS 66101.

53. A copy of documents required to be submitted by this Order, shall be submitted by mail to:

Jim Stricker
Iowa Department of Natural Resources
Wallace Building
502 E. 9th Street
Des Moines, IA 50319-0034.

General Provisions

Effect of Compliance with the Terms of this Order for Compliance

54. Compliance with the terms of this Order shall not relieve Respondent of liability for,

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or preclude EPA from, initiating an administrative or judicial enforcement action to recover penalties for any violations of the CWA, or to seek additional injunctive relief, pursuant to Section 309 of the CWA, 33 U.S.C. § 1319.

55. This Order does not constitute a waiver or a modification of any requirements of the Clean Water Act, 33 U.S.C. § 1251 et seq., all of which remain in full force and effect. The EPA retains the right to seek any and all remedies available under Sections 309(b), (c), (d) or (g) of the Act, 33 U.S.C. § 1319(b), (c), (d) or (g), for any violation cited in this Order. Issuance of this Order shall not be deemed an election by EPA to forgo any civil or criminal action to seek penalties, fines, or other appropriate relief under the Act for any violation whatsoever.

Access and Requests for Information

56. Nothing in this Order shall limit EPA's right to obtain access to, and/or to inspect Respondent's facility, and/or to request additional information from Respondent, pursuant to the authority of Section 308 of the CWA, 33 U.S.C. § 1318 and/or any other authority.

Severability

57. If any provision or authority of this Order, or the application of this Order to Respondent, is held by federal judicial authority to be invalid, the application to Respondent of the remainder of this Order shall remain in full force and effect and shall not be affected by such a holding.

Effective Date

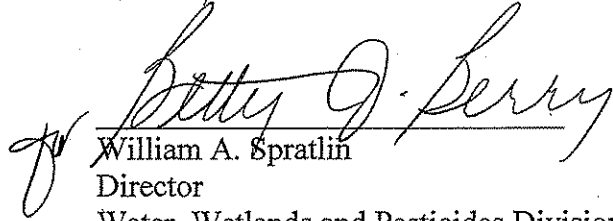
58. The terms of this Order shall be effective and enforceable against Respondent upon its receipt of an executed copy of the Order.

Termination


59. This Order shall remain in effect until a written notice of termination is issued by an authorized representative of the U.S. Environmental Protection Agency. Such notice shall not be given until all of the requirements of this Order have been met.

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Issued this 24th day of January, 2008.



William A. Spratlin
Director
Water, Wetlands and Pesticides Division
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101



Alex Chen
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region VII
901 North Fifth Street
Kansas City, Kansas 66101

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CERTIFICATE OF SERVICE

I certify that on the date noted below I hand delivered the original and one true copy of this Findings of Violation and Order for Compliance to the Regional Hearing Clerk, United States Environmental Protection Agency, 901 North Fifth Street, Kansas City, Kansas 66101.

I further certify that on the date noted below I sent a copy of the foregoing Order for Compliance by first class certified mail, return receipt requested, to:

Timothy C. Hogan
Registered Agent for Michael's Landing, LLC
3101 Ingersoll Avenue
Des Moines, Iowa 50312

Jim Stricker
Iowa Department of Natural Resources
Wallace Building
502 E. 9th Street
Des Moines, IA 50319-0034.

1/28/08
Date

E. D. H. C. Watchett